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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY  
CC Docket No. 94-54

In The Matter of

INTERCONNECTION AND RESALE  
OBLIGATIONS PERTAINING TO  
COMMERCIAL MOBILE RADIO  
SERVICES

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COMMENTS OF THE  
TELECOMMUNICATIONS RESELLERS ASSOCIATION  
ON  
PETITIONS FOR RECONSIDERATION

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TELECOMMUNICATIONS  
RESELLERS ASSOCIATION

Charles C. Hunter  
Catherine M. Hannan  
HUNTER & MOW, P.C.  
1620 I Street, N.W.  
Suite 701  
Washington, D.C. 20006  
(202) 293-2500

September 27, 1996

Its Attorneys

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## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
SUMMARY .....	ii
I. INTRODUCTION .....	2
II. ARGUMENT .....	5
A. A Mandatory CMRS Resale Requirement is Necessary and Appropriate. ....	5
B. Bundled Service Offerings Must Remain Subject to the Resale Requirement in Order to Prevent Discrimination Against Resellers .....	10
C. The Resale "Sunset" Provision is Premature and Unnecessary .....	12
III. CONCLUSION .....	14

## **SUMMARY**

The Telecommunications Resellers Association, an organization consisting of nearly 500 resale carriers and their underlying product and service suppliers, commends the Commission on the issuance of a well-reasoned, analytically sound decision enlarging the scope of wireless services subject to the resale obligations of commercial mobile radio services providers. TRA urges the Commission to maintain the integrity of the First Report and Order in the face of numerous petitions for reconsideration which, with but one exception, present wholly unconvincing arguments for Commission modification of the First Report and Order.

Specifically, TRA urges the Commission to retain the CMRS resale requirement established by the First Report and Order and to continue the application of the resale requirement to bundled service packages. TRA also urges the Commission to reinforce the First Report and Order's commitment to resale by rescinding the resale requirement "sunset" provision and adopting a "wait-and-see" approach capable of responding, at the appropriate time, to actual market changes.

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TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), hereby submits these Comments addressing issues raised by petitioners seeking reconsideration of various aspects of the Commission's First Report and Order, Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, FCC No. 96-263 (released July 12, 1996) (the "First Report and Order").<sup>1</sup> The Commission's decision in the First Report and Order represents a well-reasoned and appropriate response to the issues confronting the Commission and, with one exception, discussed below, should be retained by the Commission in its original form.

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<sup>1</sup> Petitions for reconsideration have been filed by American Mobile Telecommunications Association, Inc.; AT&T Wireless Services, Inc.; Cellular Resellers Association; Connecticut Telephone and Communications Systems, Inc.; National Wireless Resellers Association; Nextel Communications, Inc.; Personal Communications Industry Association; and Small Business in Telecommunications.

TRA adamantly opposes any diminution of the CMRS resale requirement adopted by the Commission. Further, TRA urges the Commission to steadfastly maintain the requirement that bundled packages which include non-Title II components are specifically encompassed within the resale requirement and must therefore be made available in bundled form for resale. Finally, TRA asks the Commission to be mindful of the historical resistance of cellular carriers to resale. Coupled with the inevitably delay which will necessarily precede the emergence of a fully competitive wireless market environment, TRA agrees with those petitioners who urge the Commission that the adoption of a "sunset" provision at this time would be premature; a "sunset" of the resale requirement would be appropriate only after the market itself has decreed the obsolescence of the requirement.

## **I**

### **INTRODUCTION**

TRA, an association of nearly 500 resale carriers and their underlying product and service vendors, was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now

actively reselling international, wireless, enhanced and internet services.<sup>2</sup> TRA's resale carrier members are also poised to enter the local telecommunications market and to bring to small business and residential users of local service the affordable rates, service diversity and personalized customer service that has allowed them to capture a five to ten percent share of the interexchange market in less than a decade.

TRA has been an active participant in this proceeding, and commends the Commission for its recognition of the importance of resale in the wireless environment and its extension of the cellular resale requirement to other wireless telecommunications services. TRA agrees with the Commission that "under current market conditions, restrictions on resale by cellular, broadband personal communications services (PCS), and certain specialized mobile radio (hereinafter 'covered SMR') providers will inhibit the development of competition in these services."<sup>3</sup> Accordingly, TRA strongly disputes the blithe assertions of the Personal

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<sup>2</sup> TRA's resale carrier members serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates otherwise available only to much larger users. TRA's resale carrier members also offer small and mid-sized commercial customers enhanced, value-added products and services, including a variety of sophisticated billing options, as well as personalized customer support functions, that are generally reserved for large-volume corporate users.

Not yet a decade old, TRA's resale carrier members -- the bulk of whom are small to mid-sized, albeit high-growth, companies -- nonetheless collectively serve millions of residential and commercial customers and generate annual revenues in the billions of dollars. The emergence and dramatic growth of the resale industry over the past five to ten years have produced thousands of new jobs and myriad new commercial opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based interexchange carriers by providing an extended, indirect marketing arm for their services, thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small business community, TRA's resale carrier members have helped other small and mid-sized companies expand their businesses and generate new employment opportunities.

<sup>3</sup> Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order, CC Docket No. 94-54, FCC 96-263 (released July 12, 1996) ("First Report and Order") at ¶12. (footnote omitted)

Communications Industry Association ("PCIA") that a CMRS resale requirement is both unnecessary and inappropriate and, in a statement which strains credulity, that a resale requirement "cannot be reconciled with the spirit of the Telecommunications Act of 1996 or recent developments in the CMRS marketplace."<sup>4</sup> As demonstrated below, provisions specifically structured not only to foster but actually mandate the availability of telecommunications resale play a significant role in the Telecommunications Act of 1996<sup>5</sup> recently enacted by the Congress. The Commission's independent recognition of the benefits, and active encouragement, of resale activities predates enactment of the 1996 Act by many years.

TRA also agrees with the Commission that "excluding from the resale rule all bundled packages that include non-Title II components would potentially offer carriers an easy means to circumvent the rule."<sup>6</sup> In arguing for reconsideration of the Commission's conclusion that "CMRS providers are obligated to offer resellers the same bundled packages of services and customer premises equipment ('CPE') that they offer to other large customers,"<sup>7</sup> AT&T ignores the tremendous potential for carrier discrimination against resellers that such a policy would sanction. TRA agrees with the Commission that the position urged by AT&T would inject into the First Report and Order a loophole which quite possibly could envelop the rule and, accordingly, reconsideration of this point would be both dangerous and inappropriate.

Finally, TRA urges the Commission to allow the market to dictate when, and if, the CMRS resale requirement should be obviated. As ever more vigorous competition develops

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<sup>4</sup> Comments of PCIA at 4.

<sup>5</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act").

<sup>6</sup> First Report and Order at ¶ 31.

<sup>7</sup> AT&T Petition at 2.

in CMRS markets, prices will be pushed closer and closer to cost. At that point, opportunities for resale activity will dwindle, since resale can only occur in a situation where a sufficient price differential exists between the wholesale price the reseller must pay for services and the retail rates that a competitive market will support. Paradoxically, a resale requirement is only unnecessary in a perfectly competitive market; until markets are perfectly competitive -- that is, for as long as resale activities exist -- discrimination against resellers will be advantageous to facilities-based providers. Accordingly, TRA urges the Commission to adopt a "wait-and-see" policy, retaining the CMRS resale requirement until such time as actual and consequential competition from PCS and other wireless services have rendered the market perfectly competitive.

## II.

### ARGUMENT

#### **A. A Mandatory CMRS Resale Requirement is Necessary and Appropriate.**

At the outset, it is beyond dispute that resale facilitates numerous public interest goals by, among other things, exerting downward pressure on rates and enhancing the diversity and quality of product and service offerings.<sup>8</sup> In the First Report and Order, the Commission enumerated the "important public benefits" resale confers:

First, the economic literature on resale price maintenance illustrates that prohibiting resale restrictions may reduce the likelihood of systematic price discrimination and cartel behavior. Second, in the wireline context the resale rule has been found to promote the public interest by: (1) encouraging competitive pricing; (2) discouraging unjust, unreasonable, and unreasonably discriminatory carrier practices; (3) reducing the need for detailed regulatory

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<sup>8</sup> First Report and Order at ¶ 12.



intervention and the administrative expenditures and potential for market distortions that may accompany such intervention; (4) promoting innovation and the efficient deployment and use of telecommunications facilities; (5) improving carrier management and marketing; (6) generating increased research and development; and (7) positively affecting the growth of the market for telecommunications services. Third, we have recognized the public interest benefits of resale in the wireless context, and have facilitated them by explicitly conditioning cellular licenses on adherence to our resale policy. In particular, we have recognized that resale of wireless services can speed the deployment of competition by permitting new entrants to begin offering service to the public before they have built out their facilities.<sup>9</sup>

The Commission went on to reaffirm the importance of resale, stressing that "in markets that have not achieved full competition . . . an active resale market helps to replicate many of the features of competition . . . [and] hastens the arrival of competition by speeding the development of new competitors."<sup>10</sup>

The Congress has recently reaffirmed the importance of resale, not only imposing in the local exchange telecommunications market a resale requirement, but also requiring incumbent local exchange carriers to make all retail services available at *wholesale* rates.<sup>11</sup> In implementing the Congressional mandate, the Commission reaffirmed "the strategic importance of resale to the development of competition".<sup>12</sup> Noting that resale would be an important entry strategy for small businesses that may lack capital to compete in the local exchange market by

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<sup>9</sup> Id. at ¶ 10.

<sup>10</sup> Id. at ¶ 11.

<sup>11</sup> 1996 Act, §§ 251(c)(3), 252(d)(1)(A); 47 U.S.C. §§ 251(c)(3), 252(d)(1)(A).

<sup>12</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶ 907 (released August 8, 1996), pet. for rev. pending, *sub nom.* Iowa Utilities Board v. Federal Communications Commission and United States of America, Case No. 96-3321 (8th Cir., Sept. 5, 1996) ("Local Competition Order").

purchasing unbundled elements or by building their own networks,"<sup>13</sup> the Commission found that it was "especially important to promulgate rules for use by state commissions in setting wholesale rates" and to "reduce unnecessary burdens on resellers seeking to enter local exchange markets" by presuming resale restrictions and conditions to be unreasonable.<sup>14</sup> In light of the clear Congressional and regulatory policy favoring resale, PCIA's contention that a mandatory CMRS resale requirement "cannot be reconciled with the spirit of the Telecommunications Act of 1996" is singularly lacking in merit.

PCIA's suggestion that a mandatory CMRS resale obligation is not essential because "competition currently existent in the CMRS marketplace . . . is much greater than that in any other telecommunications segment where a federal resale requirement has been imposed, and will increase significantly over the next few years without a mandatory resale obligation"<sup>15</sup> is no more meritorious. As to the first point, PCIA is flat out wrong. The interexchange market is certainly more competitive than the current CMRS marketplace; indeed, it is populated by four nationwide network providers, numerous regional network providers and a host of other wholesale carriers. By contrast, the CMRS market consists, almost exclusively, of a duopoly system plagued by significant entry barrier constraints. As the Commission has recently noted,

Most CMRS customers today subscribe to cellular service because broadband PCS has been offered for a very short time, SMR service has typically been used for communications among mobile units of the same business subscriber (e.g., taxi dispatch), and mobile satellite services have typically been used only in rural areas. The possibility of entry by new competitors can constrain

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<sup>13</sup> Id.

<sup>14</sup> Id. at ¶¶ 907, 939.

<sup>15</sup> PCIA Petition at 5.

monopolistic, or in this case, duopolistic, conduct by incumbent providers and thus serve the public interest by potentially lowering prices, improving service quality, and encouraging innovation. We note that while the cellular industry, with two facilities-based carriers offering service in each market, is more competitive than traditional monopoly telephone markets, it is far from perfectly competitive. The United States Government Accounting Office, the Department of Justice, and the Commission have determined that only limited competition currently exists in the cellular market.<sup>16</sup>

Notwithstanding the fact that the interexchange telecommunications market is characterized by significantly more vigorous competition than the present-day CMRS market, the Commission continues to enforce policies which require that "all common carriers . . . permit unlimited resale of their services."<sup>17</sup> Indeed, the Commission affirmatively deems unjust and unreasonable, and prohibits restrictions on, resale<sup>18</sup> and has declared that any "[a]ctions taken by a carrier that effectively obstruct the Commission's resale requirements are inherently suspect."<sup>19</sup>

Further, although competition in the CMRS market may eventually approach the dynamic level already attained in the interexchange market, PCIA overstates the likely swell in CMRS competition and the timeframe within which intensified competition may reasonably be expected to emerge. As several petitioners have noted, even under the Commission's stringent construction requirement rules, PCS licensees of 30 MHz blocks may retain their respective PCS

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<sup>16</sup> Telephone Number Portability, CC Docket No. 95-116, First Report and Order, FCC Rcd. 11 at 8352, 8435 (1996), *pet. for recon. pending*. (internal citations omitted) ("Number Portability Order").

<sup>17</sup> AT&T Communications: Apparent Liability for Forfeiture and Order to Show Cause, 10 FCC Rcd. 1664, ¶2 (1995), *pet. for rev. pending AT&T Corp. v. FCC*, Case No. 95-1339 (filed July 5, 1995) ("AT&T Forfeiture Order").

<sup>18</sup> Resale and Shared Use of Common Carrier Services, 60 F.C.C.2d 261, 298-99 (1976) ("Resale and Shared Use Order"), *recon.* 62 F.C.C.2d 588 (1977), *aff'd sub nom. American Tel. & Tel. Co. v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); Resale and Shared Use of Common Carrier Services, 83 F.C.C.2d 167 (1980), *recon.* 86 F.C.C.2d 820 (1981).

<sup>19</sup> AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶ 13.

licenses by serving a minimum of one-third of the population in their respective service areas within five years of being licensed; after ten years, PCS licensees must be in a position to provide adequate service to only two-thirds of the service area population.<sup>20</sup> Service requirements for PCS licensees of 10 MHz blocks are understandably less arduous; such licensees are required "to provide adequate service to only one-quarter of the population in their licensed area within five years of being licensed."<sup>21</sup>

Given the incipient nature of the PCS industry, TRA does not contest the prudence of the Commission's PCS buildout requirements. Rather, TRA suggests that the limited nature and extended implementation timeframe of the buildout requirements themselves support the conclusion that significant PCS service options are likely remain unavailable to many consumers well into the next decade.<sup>22</sup>

Finally, PCIA throws up a smoke screen of implausible and unrealistic "significant costs" which a mandatory resale requirement will allegedly create for both CMRS operators and consumers. The examples cited by PCIA merely mimic the arguments traditionally raised by facilities-based carriers -- and always sounded rejected by the Commission -- in the continuing effort to forestall advancement of the Commission's evolving policies in favor of resale activities. PCIA's examples of "significant costs" include

- (1) substantial legal and administrative costs implicated by the need to review each contract for compliance with federal resale

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<sup>20</sup> 47 C.F.R. § 24.203(a).

<sup>21</sup> 47 C.F.R. § 24.203(b).

<sup>22</sup> PCIA cites the Commission's CMRS Annual Report to demonstrate that "cellular prices have been declining in anticipation of the wide-spread introduction of PCS." PCIA Petition at 6. TRA suggests that any price which is capable of "falling dramatically" in response to a mere anticipation of competition is a price which is notoriously inflated at the outset.

obligations and litigate resultant disputes; (2) costs to consumers as a result of deterred aggressive pricing practices, constrained volume pricing techniques, and thwarted innovative offerings; (3) costs to consumers resulting from discouraged marketplace negotiations; and (4) costs associated with disputes arising out of carriers' efforts to negotiate resale contracts that take into account the considerable expense of modifying end-user units and billing systems, among other things.<sup>23</sup>

The costs cited by PCIA merely confirm that cellular carriers retain market power.

There would be no necessity, in a competitive market, to review contracts for compliance with federal resale obligations -- in a competitive market, the business of resellers would be actively courted. In a competitive market, carriers would be precluded from pulling back their pricing practices by the presence of active competition. In short, in a competitive market, the costs cited by PCIA would constitute merely routine costs of doing business which carriers would necessarily incur in the course of obtaining resellers as customers. The Commission has explicitly "recognized the public interest benefits of resale in the wireless context," noting that "resale of wireless services can speed the deployment of competition by permitting new entrants to begin offering service to the public before they have built out their facilities."<sup>24</sup>

**B. Bundled Service Offerings Must Remain Subject to the Resale Requirement in Order to Prevent Discrimination Against Resellers**

In making the CMRS resale requirement applicable to bundled service, the Commission stated that "excluding from the resale rule all bundled packages that include non-Title II components would potentially offer carriers an easy means to circumvent the rule."<sup>25</sup>

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<sup>23</sup> PCIA Petition at 9 (internal citations omitted).

<sup>24</sup> First Report and Order at ¶ 10.

<sup>25</sup> Id. at ¶ 31.

AT&T seeks reconsideration of the Commission's decision because "[i]t is not evident how exempting CPE and non-common carrier services from the resale requirement would cause this outcome."<sup>26</sup>

As TRA has noted in previous submissions to the Commission, the relationship between resale carriers and their network providers is an awkward one at best. On the one hand, even small resale carriers are large customers, representing substantial sources of revenues for their underlying carriers.<sup>27</sup> Resale carriers are also, however, aggressive competitors that utilize whatever "price breaks" they secure from their network providers as a result of their substantial traffic volumes to compete for the small and mid-sized accounts that would otherwise provide these underlying carriers with their highest "margins." Accordingly, there is a strong incentive for carriers to intentionally discriminate between resale carrier customers and other large customers. An underlying carrier can devastate a resale carrier customer's business, for example, by not allowing it access to rates and services provided to large corporate users with comparable traffic volumes. By requiring resale of bundled packages, the Commission seeks to prevent precisely this result.

In the absence of a resale obligation encompassing the totality of bundled services offerings, a carrier combining an offering of service with CPE or enhanced services possesses the unfettered ability to structure a package for the benefit of a large corporate user which

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<sup>26</sup> AT&T Petition at 3.

<sup>27</sup> Competition in the Interstate, Interexchange Marketplace, 6 FCC Rcd. 5880, ¶ 115 (1991) ("First Interexchange Competition Order"), 6 FCC Rcd. 7255 (1991), 6 FCC Rcd. 7569 (1991), 7 FCC Rcd. 2677 (1992), *recon.* 8 FCC Rcd. 2659 (1993), 8 FCC Rcd. 3668 (1993), 8 FCC Rcd. 5046 (1993), *recon.* 10 FCC Rcd 4562 (1995) ("[R]esellers, like other users, are valued customers -- in fact, they are large customers. It is not reasonable to assume that AT&T will refuse to present them with viable service options at reasonable rates.").

effectively lowers the rate of the service element to the corporate user without triggering the carrier's obligation to offer an equivalent "effective" service rate to resellers. The carrier accomplishes this end-run around the resale requirement by maintaining an official price for the service element but bundling into the arrangement unregulated CPE or enhanced services at such a reduced rate (or at no charge) as to adjust the price of the service element downward to a level the large corporate user is willing to pay. A reseller, however, would only be entitled to take the service at the "official" -- i.e., artificially inflated -- price. TRA strongly urges to Commission to continue foreclosing this end-run tactic by affirming its refusal to "limit application of the resale rule as AT&T requests."<sup>28</sup>

**C.     The Resale 'Sunset' Provision Is Premature  
And Unnecessary**

Resale represents a regulatory "catch-22". The only telecommunications markets in which resale can exist without regulatory protection are markets in which resale carriers cannot survive. Resale cannot exist in a perfectly competitive market; in a perfectly competitive market, market forces drive prices to cost, depriving resale carriers of the wholesale/resale margins within which, by definition, they must operate. In a perfectly competitive market, the differential between even discounted volume/term-based pricing will not allow resale carriers to provide their end users with necessary price breaks, much less cover the resale carrier's marketing, customer service, billing and other "back-office" costs.

In a less than perfectly competitive market, facilities-based providers retain sufficient market power to discriminate against resale carriers. As noted above, a resale carrier may be a large customer of its network provider, but it is also an aggressive competitor of that

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<sup>28</sup> First Report and Order at ¶ 31.

carrier. Hence, resale carriers tend to be the primary targets of discrimination by facilities-based carriers. A facilities-based carrier which possesses a roughly 50 percent market share is all the more likely to engage in such discrimination because five out of every ten customers secured by a resale carrier are drawn from the facilities-based carrier's customer base. As the market becomes more populated, however, incentives to discriminate remain as margins become thinner and the willingness to share a portion of those shrinking margins diminishes. Hence, absent regulatory requirements that services be made available for resale, resale will languish in a less than perfectly competitive market.

As discussed above, the Commission has recently concluded that "the cellular industry . . . is far from perfectly competitive."<sup>29</sup> Indeed, "[t]he United States Government Accounting Office, the Department of Justice and the Commission have determined that only limited competition currently exists in the cellular market."<sup>30</sup> Expanding on this view, the Commission noted that "[m]ost CMRS customers today subscribe to cellular service because broadband PCS has been offered for a short time, SMR service has typically been used for communications among mobile units of the same business subscriber (e.g., taxi dispatch), and mobile satellite services have typically been used in rural areas."<sup>31</sup>

Given that the wireless market is currently "far from perfectly competitive," a resale requirement is necessary to secure for consumers the "important public benefits" the Commission has consistently found flow from a vibrant resale industry. If PCS and enhanced

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<sup>29</sup> Telephone Number Portability, First Report and Order, 11 FCC Rcd. 8352 at ¶ 158.

<sup>30</sup> Id.

<sup>31</sup> Id.



SMR service realize their full competitive potential, it may well be that there will be no place for resale in future wireless markets because the markets will have become perfectly competitive. If this proves to be the case, market forces will render a "sunset" requirement unnecessary. If, however, wireless markets do not evolve into perfectly competitive markets, a "sunset" requirement will deprive consumers of the benefits of resale.

In short, the "sunset" requirement adopted by the Commission is either unnecessary or unwise. TRA submits that the better policy is to retain the CMRS resale requirement, allowing the market to dictate when, if ever, resale is no longer viable.

### **III.**


#### **CONCLUSION**

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to maintain the integrity of the First Report and Order by retaining the CMRS resale requirement and the application of the resale requirement to bundled service packages. TRA further urges the Commission to reinforce the First Report and Order's commitment to

resale by rescinding the resale requirement "sunset" provision and adopting a "wait-and-see" approach capable of responding, at the appropriate time, to actual market changes.

Respectfully submitted,

**TELECOMMUNICATIONS  
RESELLERS ASSOCIATION**

By: 

Charles C. Hunter  
Catherine M. Hannan  
HUNTER & MOW, P.C.  
1620 I Street, N.W.  
Suite 701  
Washington, D.C. 20006  
(202) 293-2500

September 27, 1996

Its Attorneys

## **CERTIFICATE OF SERVICE**

I, Jeannine M. Greene, hereby certify that copies of the foregoing document were mailed this 27th day of September, 1996, by United States First Class mail, postage prepaid, to the following:

Lewis J. Paper  
David M. Janas  
Jacob S. Farber  
Dickstein, Shapiro, Morin  
& Oshinsky, LLP  
2101 L Street, N.W.  
Washington, D.C. 20037

Alan R. Shark, President  
American Mobile Telecommunications  
Association, Inc.  
1150 18th Street, N.W., Suite 250  
Washington, D.C. 20036

Elizabeth R. Sachs  
Lukas, McGowan, Nace & Gutierrez  
1111 19th Street, N.W.  
Suite 1200  
Washington, D.C. 20036

Dennis C. Brown  
Brown and Schwaninger  
1835 K Street, N.W.  
Suite 650  
Washington, D.C. 20006

Cathleen A. Massey  
AT&T Wireless Services, Inc.  
Vice President - External Affairs  
1150 Connecticut Avenue, N.W.  
Suite 400  
Washington, D.C. 20036

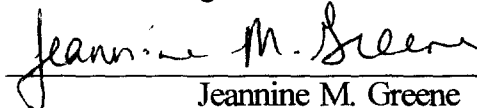
Douglas L. Povich  
Katherine S. Poole  
Kelly & Povich, P.C.  
1101 30th Street, N.W.  
Suite 300  
Washington, D.C. 20007

Robert S. Foosaner  
Lawrence R. Krevor  
Laura L. Holloway  
Nextel Communications, Inc.  
800 Connecticut Avenue, N.W.  
Suite 1001  
Washington, D.C. 20006

Mark J. Golden  
Vice President, Industry Affairs  
Personal Communications Industry  
Association  
500 Montgomery Street  
Suite 700  
Alexandria, VA 22314

R. Michael Senkowski  
Karen A. Kincaid  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

Howard J. Symons  
Sarah J. Seidman  
Mintz, Levin, Cohn, Ferris,  
Glovsky and Popeo  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004

  
Jeannine M. Greene